No. 86-1349

# In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, ET. AL.,
PETITIONERS

*v.*

RONALD REAGAN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the unconstitutional legislative veto provision in the section of the Federal Pay Comparability Act of 1970 that authorizes the President to prepare an alternative pay plan in certain circumstances is severable from the remainder of that section.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-29a) is reported at 806 F.2d 1034. The opinion of the district court (Pet. App. 1a-14a) is reported at 629 F. Supp. 762.

### JURISDICTION

The judgment of the court of appeals was entered on December 2, 1986, and the petition for a writ of certiorari was filed on February 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.*, are set forth at Pet. App. 30a-38a.

## STATEMENT

1. The Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.* (the Pay Act), provides a statutory mechanism for adjusting the rates of pay of federal employees covered by various statutory pay systems. The Pay Act provides that it is the policy of Congress that statutory pay systems be based on the following principles: (1) that there be equal pay for equal work, (2) that pay distinctions be maintained in keeping with work and performance distinctions, (3) that federal pay rates be comparable with private enterprise pay rates for the same levels of work, and (4) that the pay levels for the various statutory pay systems be interrelated. 5 U.S.C. 5301(a).

- The Act generally authorizes the President to make annual "comparability" adjustments in federal pay rates under the standards contained in 5 U.S.C. 5301(a), based on the report of a designated pay "agent" and the recommendations of the Advisory Committee on Federal Pay. 5 U.S.C. 5305(a) and (b). However, the Pay Act also provides an alternative method for the adjustment of pay. "If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make a pay adjustment" under the standards just described, the President is authorized to prepare and transmit to Congress, before September 1 of that year, "such alternative plan with respect to a pay adjustment as he considers appropriate," together with "the reasons therefor." 5 U.S.C. 5305(c)(1). The Act then specifies that this alternative plan "becomes effective" at the beginning of the first applicable pay period on or after October 1, unless either House of Congress adopts a resolution "disapproving" the plan within 30 legislative days of its transmittal. In that event, the President is required to implement the comparability adjustments indicated by the factors in 5 U.S.C. 5301(a).

2. Petitioners, two labor organizations representing federal employees and several individual federal employees, brought this action in the United States District Court for the District of Columbia to challenge alternative pay plans that were prepared by the President for fiscal years 1980, 1981, 1983 and 1985 (Pet. App. 4a).[1] Petitioners contended (and respondents agreed) that the one-House legislative veto provision in 5 U.S.C. 5305(c)(2) is unconstitutional under this Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). Petitioners further contended that the one-House veto provision is inseverable from the remainder of the alternative pay plan provisions in the Pay Act, but that the comparability adjustment provisions of the Pay Act survive (Pet. App. 9a, 20a). Accordingly, petitioners contended that the alternative pay plans that were prepared and formally transmitted by the President to Congress—and that were then placed in effect by Executive Order of the President after Congress failed to disapprove them—were invalid (see Pet. App. 4a-5a).

In a decision dated July 31, 1985, the district court rejected petitioners' challenge to the pay plans for fiscal years 1980, 1981, 1983 and 1985 (Pet. App. 1a-14a).[2] Relying on the severability analysis in *Chadha* and in the District of Columbia Circuit's opinion in *Alaska Airlines, Inc.* v. *Donovan*, 766 F.2d 1550 (1985), aff'd No. 85-920

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[1] Petitioners National Treasury Employees Union, et al. (NTEU) challenged only the alternative pay plan for fiscal year 1985 (Pet. App. 4a).

[2] The district court rejected respondents' contention that the Claims Court had exclusive jurisdiction over petitioners' claims (Pet. App. 5a-8a). Respondents did not raise that jurisdictional issue in the court of appeals. The district court also rejected the contention of petitioners American Federation of Goverment Employees, *et al.* (AFGE), that the alternative pay plan implemented by the President for fiscal year 1985 was defective as a statutory matter (*id.* at 13a). The court of appeals affirmed that statutory holding (*id.* at 27a-28a), and petitioners do not raise that issue here.

(Mar. 25, 1987), the court held that petitioners had failed to carry their burden of demonstrating that Congress would not have enacted the alternative pay plan provisions of the Pay Act without the legislative veto provision. The court therefore held that the legislative veto provision in the Pay Act is severable from the remainder of the Act (Pet. App. 8a-12a). The court explained (*id.* at 11a):

> There is no persuasive evidence that Congress would have preferred no alternative pay plan provision at all to one without a one-House veto. Contrary to plaintiffs' characterization of the alternative pay plan as a limited exception to the principle of comparability which the plan was designed to achieve, the legislative history of the Pay Act indicates that it was an important "safety valve" and an integral part of the comprehensive scheme for setting federal employees' salaries. Congress recognized that comparability of pay adjustments for federal employees might not be feasible or in the nation's interest due to inflation, budget concerns, other economic conditions or national emergencies (116 Cong. Rec. 44096, 44099, 44103 (1970)). It enacted the alternative pay plan provision to ensure against automatic comparability pay adjustments without consideration of economic realities.

The district court further concluded on the basis of its study of the legislative history that "Congess would not have enacted a comprehensive scheme for pay adjustments for federal employees absent providing an important role for the President, even without the one-House veto" (Pet. App. 11a). Yet "[w]ithout the alternative pay plan provision," the court observed, "the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay" (*ibid.*).

Finally, the court observed that although the alternative pay plan provision received considerable attention during the floor debate on the Pay Act, there was little discussion of the one-House veto provision. In this regard, the court noted that much of the criticism of the alternative pay plan provision was directed to the fact that Congress would be left with the statutory comparability pay raise if one House disapproved the President's alternative plan. Significantly, the court noted, proponents of the alternative pay plan approach "consistently refuted this argument by noting that Congress always had the option of passing a law if it didn't like the President's plan or the pay agent's recommendations" (Pet. App. 12a (citations omitted)).

3. A unanimous panel of the court of appeals affirmed (Pet. App. 15a-29a).[3]

a. The court of appeals first rejected petitioners' contention that the alternative pay plan constituted "an improper delegation of legislative power to the President," and therefore could not stand if stripped of the legislative veto (Pet. App. 21a-23a). Following the delegation analysis in *Yakus* v. *United States*, 321 U.S. 414 (1944), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the court of appeals held that the alternative pay plan provisions contain standards sufficient to guide and limit Executive action and to determine compliance with congressional intent. The court noted, for example, that the Act specifies that an alternative pay plan may be put into effect only on specified conditions: if the Presi-

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[3] Petitioners AFGE initially took an appeal to this Court from the district court's judgment. On December 2, 1985, the Court granted respondents' motion to dismiss that appeal for lack of jurisdiction. *AFGE* v. *Reagan*, No. 85-551. Petitioners NTEU initially took an appeal to the United States Court of Appeals for the District of Columbia Circuit. On December 20, 1985, that court granted respondents' motion to dismiss the appeal for lack of jurisdiction. *NTEU* v. *Reagan*, No. 85-5858.

dent finds a comparability adjustment inappropriate "because of national emergency or economic conditions." 5 U.S.C. 5305(c)(1). The court also noted that the Act prescribes procedures the President must follow in establishing the alternative adjustment he deems "appropriate," including the furnishing of a statement of reasons. Pet. App. 22a. On this basis, the court of appeals found that "[t]he standards for submission of an alternative plan are more specific than the provisions of other statutes with respect to which the delegation of authority has been upheld" (*ibid.*).

b. "Having addressed the question whether Congress was empowered to enact the alternative pay plan absent a one-House veto provision," the court of appeals next "consider[ed] whether Congress would have done so" if it had known that the one-House veto provision was unconstitutional (Pet. App. 23a). See *id.* at 23a-27a. Following *Chadha*, the D.C. Circuit's opinion in *Alaska Airlines*, and the plurality opinion in *Regan* v. *Time, Inc.*, 468 U.S. 641, 652-653 (1984), the court stated that the one-House veto provision must be found severable unless it is "evident from the legislative history that Congress would not have passed the alternative pay plan without the one-House veto provision" (Pet. App. 24a). In this case, the court concluded that petitioners had not shown that it is evident that Congress would not have enacted the alternative pay plan. First, the court found it "clear that the entire Act, including section 5305(c)(1), allowing the President to submit an alternative plan under certain prescribed conditions, is fully administratively operable as law absent the one-House veto provision in section 5305(c)(2)" (Pet. App. 24a). Second, the court found that although pay comparability was an important objective of the 1970 Act, "Congress was unwilling to apply the principle of full comparability automatically without some mechanism for limiting pay adjustments during periods of economic

hardship" (*id.* at 24a-25a). Congress therefore "anticipated that the alternative pay plan would provide the necessary flexibility in an otherwise essentially automatic process" (*id.* at 25a). The court also noted that the Administration supported an active paysetting role for the President, and that "[w]ithout such a provision, it is likely that a substantial number of members of Congress would not have voted for the Pay Act" (*ibid.*). The court also stressed that, as Congress recognized when it passed the Pay Act, Congress retains the option of legislating its own pay plan for the fiscal year if it is dissatisfied with both the comparability adjustment and the President's alternative pay plan. For example, the court observed, Congress overrode the President's alternative pay plan for fiscal year 1984 when it enacted the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 157, and the legislative history of that Act establishes that Congress was aware of the impact of *Chadha* on the one-House veto provision. Pet. App. 26a-27a (citing H.R. Rep. 98-425, 98th Cong., 2d Sess. 5-7 (1984)).

## ARGUMENT

The decision of the court of appeals is correct and is fully consistent with this Court's decisions in *INS* v. *Chadha*, 462 U.S. 919 (1983), and *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987). The severability question depends at bottom on an interpretation of the particular statutory provisions involved, and there is no circuit conflict regarding the interpretation of the Pay Act provisions at issue here. The suggestion that Congress would have wanted the invalidation of the legislative veto to result in a large federal pay raise is implausible in the highest degree. Since *Chadha* was decided, Congress has effectively ratified the actual pay raises for the fiscal years in question, and has acknowledged the President's continued use of the alternative pay plan authority. Review by the Court therefore is not warranted.

1. a. The principles governing the severability issue in this case are firmly rooted in this Court's precedents and were recently reiterated by the Court in *Alaska Airlines*, slip op. 5-6:

> "[A] court should refrain from invalidating more of the statute than is necessary . . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' " *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). The standard for determining the severability of an unconstitutional provision is well established: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Accord: *Regan* v. *Time, Inc.*, 468 U.S., at 653; *INS* v. *Chadha*, 462 U.S., at 931-932; *United States* v. *Jackson*, 390 U.S. 570, 585 (1968).

Contrary to petitioners' contention (Pet. 15-18), the district court and court of appeals applied these established principles and concluded, after a review of the legislative history (Pet. App. 8a-12a, 23a-27a), that petitioners had not shown that it was "evident" that Congress would have declined to enact the alternative pay plan provisions without the legislative veto. See *id.* at 9a, 10a, 24a. In so holding, the courts below discussed and followed this Court's decision in *Chadha* and the D.C. Circuit's decision in *Alaska Airlines*, which has since been unanimously affirmed by this Court. There is no reason for the Court to

review the application of settled principles and this Court's precedents to the particular statutory scheme at issue here.

b. In any event, the conclusion of the courts below that the legislative veto provision is severable from the remainder of the Pay Act is correct. As petitioners acknowledge (Pet. 20-21), the Pay Act was essentially the work of the Conference Committee, which did not adopt the approach of the bills passed by either the House or the Senate. See H.R. Conf. Rep. 91-1685, 91st Cong., 2d Sess. 14 (1970); H.R. Rep. 91-480, 91st Cong., 1st Sess. 9-10 (1969); S. Rep. 91-582, 91st Cong., 1st Sess. 4-5 (1969). With respect to the provisions at issue here, the Conference Committee adopted a paysetting mechanism that had been proposed by the Administration and embodied in H.R. 18603, 91st Cong., 2d Sess. (1970), on which extensive hearings were held in the House in July 1970. See *Compensation in the Federal Classified Salary System: Hearings on H.R. 18403 and H.R. 18603 Before the Subcomm. on Compensation of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 41-43 (1970) (*Hearings*). Administration witnesses emphasized the importance of the alternative pay provision in affording flexibility in times of emergency or economic distress, without the need for Congress to resort to the legislative process when it was determined that the Nation could not afford full comparability increases. *Id.* at 56, 62, 75-76. The provision for an alternative pay plan also was recognized by other witnesses as one of the critical differences between the Administration's bill and a competing bill (H.R. 18403, 91st Cong., 2d Sess. (1970)) which also was under consideration by the Committee. *Hearings*, at 123, 124, 164, 167.

The debate on the bill reported by the Conference Committee, which incorporated the Administration's proposal, likewise reflected the importance attached to the alternative pay plan provisions. Petitioners of course are cor-

rect in their observation (Pet. 20-22) that the debates reflect the view that pay comparability was an important objective of the Pay Act. But that observation scarcely establishes that Congress intended the *alternative* pay provisions that it included in the same Act to be rendered null and void if the legislative veto device attached to those provisions were found to be unconstitutional. As the court of appeals observed, "Congress was unwilling to apply the principle of full comparability automatically without some mechanism for limiting pay adjustments during periods of economic hardship" (Pet. App. 25a). Thus, in a passage quoted by the court of appeals (*ibid.*), Senator McGee stated (116 Cong. Rec. 44103 (1970) (emphasis added)):

> It was our feeling that comparability should be arrived at as a judgment in a far more scientific way than we have been prone to do up until now, and that in arriving at what is comparability, we have essentially removed the need for any critical serious judgment factor *except in a national crisis of some sort, including an inflationary crisis, in which there is that reserve for the President of the United States.*

Other Members of Congress likewise stressed that the alternative pay plan proposal would provide an opportunity for flexibility and the exercise of tempering judgment in an otherwise automatic and scientific process. See generally 116 Cong. Rec. 44099-44102 (1970); *id.* at 44107 (remarks of Sen. Ellender); *id.* at 44284-44286 (remarks of Rep. Udall). Still other Members discussed the role of the alternative pay plan provision without questioning the need to include it in the Act. See *id.* at 44097 (statement of Sen. Fong); *id.* at 44288 (remarks of Rep. Hogan); *id.* at 44290 (remarks of Rep. Dulski).

As both courts below recognized (Pet. App. 12a, 26a), the severability of the legislative veto provision from the remainder of the alternative pay plan section is further

supported by Congress's recognition of the consequences of an actual exercise of the veto. Much of the criticism of the alternative pay plan was that if one House vetoed the President's submission, the presumably more unacceptable alternative of a full comparability adjustment that had been recommended by the President's pay agent but rejected by the President himself would automatically go into effect. The consistent response to this criticism was that if Congress did not like the President's alternative and also was unwilling to accept the higher automatic increase, it retained the option of passing a new law prescribing a particular pay increase. See generally 116 Cong. Rec. 44100, 44101-44102, 44104-44105 (1970). Representative Udall also recognized that Congress's ultimate means of control in this area was through the enactment of legislation. He stated that he wanted to "try [the Pay Act system] around the track for a couple of years, to see if it works," and he stressed that Congress could repeal the Pay Act "if it does not work, if the President is going to abuse his power" (*id.* at 44284).

Thus, Congress recognized and accepted the distinct possibility that it would be necessary to enact a law prescribing a particular pay increase in a future fiscal year if the President's alternative pay plan was unacceptable. That, of course, was the manner in which the Pay Act could have been expected to operate if the legislative veto provision were later to be held unconstitutional and severable. For this reason, not only is the alternative pay plan provision "fully operative as a law" without the legislative veto provision (*Alaska Airlines*, slip op. 5; *Chadha*, 462 U.S. at 931-932); "the statute will function in a *manner* consistent with the intent of Congress" if the legislative veto provision is severed (*Alaska Airlines*, slip op. 6 (emphasis in original)).[4] In fact, the Pay Act has

[4] Furthermore, even without the legislative veto provision, the waiting period in 5 U.S.C. 5305(c)(2) is fully operative as a law. As a

been fully operative in this manner since the legislative veto device was held unconstitutional in *Chadha*. For every fiscal year since *Chadha* was decided, Congress has either accepted the President's alternative pay plan or has prescribed a specific pay adjustment through the enactment of a new law. See pages 15-19, *infra*.

Finally, as both courts below also observed (Pet. App. 11a, 25a), the legislative history indicates that, even without the legislative veto device, Congress would not have enacted a comprehensive mechanism for pay adjustments for federal employees without providing an important role for the President. Yet if the alternative pay plan authority were to be excised along with the legislative veto provision, "the President's role would be reduced to merely a ministerial function of reporting to Congress the recommendations of his Pay Agent and the Advisory Committee on Federal Pay" (*id.* at 11a). Accordingly, "it is likely that a substantial number of members of Congress would not have voted for the Pay Act" if it did not contain the alternative pay plan provisions (Pet. App. 25a, citing 116 Cong. Rec. 44283 (1970) (remarks of Reps. Ford and Udall); *id.* at 44105 (remarks of Sen. McGee)). In that event, of course, Congress likewise would not have enacted the comparability pay provisions that petitioners seek to invoke in this case.[5]

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result, under Section 5305(c)(2), the President's alternative pay plan does not take effect until the expiration of 30 calendar days of continuous session of Congress after the date on which it is transmitted by the President to Congress, during which period Congress may reject that plan through the enactment of a law. This "report and wait" provision affords Congress an important opportunity to assure itself that the President's actions under the Pay Act are consistent with the assignment of authority to the President under the Pay Act and with the budgetary and other views of Congress. See *Alaska Airlines*, slip op. 11 & n.12; *Chadha*, 462 U.S. at 935 n.9; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15 (1941).

[5] Petitioners cite (Pet. 22-23) instances in the legislative history in which Members referred to the legislative veto provision in connection

In sum, as the district court observed, the legislative history establishes that the alternative pay plan was "an important 'safety valve' " and is therefore "an integral part of the comprehensive scheme for setting federal employees' salaries" (Pet. App. 11a). Petitioners in fact conceded that it is "self-evident" that "Congress wanted to provide the possibility of an alternative to pay comparability" (Pet. 25). And petitioners further concede that the question "[w]hether Congress would have provided federal employees with pay comparability in the absence of an alternative pay provision" is "obviously pertinent" to the severability issue (Pet. 16). Against this background, the district court and court of appeals correctly concluded that petitioners had failed to carry their burden of establishing that it was "evident" that Congress would not have enacted the alternative pay plan provisions if it had known that the legislative veto device was unconstitutional.

2. Even if petitioners' severability argument had merit as an original matter, however, they would not be entitled to relief in this case.

a. To begin with, the decision in *Chadha* should not affect the alternative pay plans for fiscal years 1980, 1981, and 1983, because each of those plans was formally placed in effect by Executive Order of the President prior to June 23, 1983, the date of this Court's decision in *Chadha*. See

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with the alternative pay plan section. Those statements for the most part reflect nothing more than an accurate description of the statutory scheme and how it would operate if the legislative veto device were ever invoked by Congress under the Pay Act (which it never was). They therefore add little to the fact that the legislative veto device was included in the statutory scheme as enacted. In particular, the statements upon which petitioners rely do not demonstrate that Congress would have preferred no alternative pay plan provision at all if—contrary to the Members' apparent assumption at the time they made the remarks—the legislative veto device were later held unconstitutional.

Pet. App. 4a-5a. Before being placed in effect, each plan was submitted to Congress pursuant to 5 U.S.C. 5305(c), and neither House of Congress exercised its authority to disapprove the plan. There is not the slightest reason to think that Congress would have wanted a court now to invalidate pay plans that have already become effective, merely because of the presence of a since-invalidated legislative veto provision that Congress did not choose to exercise during the period it itself prescribed. This case is in this respect unlike *Chadha*, where one House of Congress actually exercised the legislative veto authority, and the question was whether the Executive action should be sustained despite its *failure* to become effective under the statutory procedure.

The three relevant considerations bearing on the question of retroactive application of judicial decisions under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), further support the conclusion that *Chadha* should not be applied retroactively to invalidate the alternative pay plans for fiscal years 1980, 1981 and 1983. See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (opinion of Brennan, J.). First, the Court in *Chadha* decided an issue of first impression whose resolution was not clearly foreshadowed by earlier decisions of this Court. Second, retroactive application of *Chadha* to the plans for the three years at issue plainly is not necessary to further the operation of that decision, since, unlike in *Chadha* itself, neither House actually exercised the veto authority and accordingly no one was injured by unconstitutional action. Third, retroactive application of *Chadha* would produce "substantial inequitable results" (*Northern Pipeline*, 458 U.S. at 88). Budgetary planning for those years went forward and personnel were paid on the assumption that the alternative pay plans had been validly placed in effect. By the same token, retroactive increases in pay for those years (and

perhaps for subsequent years, to account for the higher base to which subsequent adjustments would have been added) would result in a substantial windfall for employees, who could have had no reasonable expectation that they would receive those greater amounts.

3. Furthermore, in laws passed by Congress since *Chadha* was decided, Congress has unambiguously approved both the alternative pay plans for the four fiscal years at issue in this case (including the post-*Chadha* plan for fiscal year 1985) and the President's continued submission of alternative pay plans generally.

a. The first relevant statutory provision is Section 202(a)(1) of the Omnibus Budget Reconciliation Act of 1983, Pub. L. No. 98-270, 98 Stat. 158, which provided:

> Notwithstanding any other provision of law, in the case of fiscal year 1984, the overall percentage of the adjustment under section 5305 of title 5, United States Code, in the rates of pay under the General Schedule, and in the rates of pay under the other statutory pay systems, shall be an increase of 4 percent.

This statutorily prescribed increase was in lieu of a 3.5% increase in the President's alternative pay plan for fiscal year 1984. See Federal Civilian Pay Increases, 19 Weekly Comp. Pres. Doc. 1190 (Aug. 31, 1983).

As the court of appeals observed (Pet. App. 26a-27a), the legislative history of this Act demonstrates that Congress was fully aware of the *Chadha* decision and its possible impact on the alternative pay plan mechanism. See H.R. Rep. 98-425, 98th Cong., 2d Sess. 5-7 (1984). But instead of eliminating the alternative pay plan authority altogether, in light of *Chadha,* Congress chose to enact narrower legislation that overrode the President's alternative plan only for the particular fiscal year in question. Congress therefore fulfilled the prophecy of supporters of the Pay Act during the 1970 congressional debates, that Congress would be prepared to enact new legislation

(rather than to rely on the one-House veto alone) if it disapproved of the President's alternative proposal. See page 11, *supra*.

Significantly, moreover, the House Report on the 1983 Act noted that Presidents in the past had "made extensive use of the alternative plan authority" and that "a full comparability adjustment had not been made since October 1977, with the result that Federal pay now lags more than 20 percent behind 'comparability' as envisioned by the 1970 Act." H.R. Rep. 98-425, *supra*, at 5. Nevertheless, the four percent increase prescribed by statute for fiscal year 1984 was obviously intended to be added on top of the pay rates as they then existed by virtue of the President's alternative pay plans for the preceding years, not, as petitioners urge in this case, the higher rates that would be required if the adjustment for fiscal years 1980, 1981 and 1983 were to be calculated according to comparability levels. The Omnibus Reconciliation Act for fiscal year 1983 therefore constitutes a clear ratification by Congress of the pay rates as they had been adjusted in preceding years. For this reason, even if petitioners' severability analysis were correct, the courts below would have no authority to order higher pay rates for fiscal years 1980, 1981 and 1983 on a retroactive basis.

b. The remaining alternative pay plan petitioners have challenged in this case is that for fiscal year 1985. But Congress has also ratified that adjustment, when it enacted Title II of the Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 363. That Title, which is captioned "Increased Pay Costs For The Fiscal Year 1985", makes available to numerous federal agencies "additional amounts for appropriations for the fiscal year 1985, *for increased pay costs authorized by or pursuant to law*" (*ibid.* (emphasis added)). The House Report notes that among the pay increases to be funded out of this sup-

plemental appropriation were the "[c]ivilian and military pay raises [that] were made effective in January 1985 under Executive Order No. 12496." H.R. Rep. 99-142, 99th Cong., 1st Sess. 141 (1985). Executive Order 12496 was the order by which the President placed in effect the alternative pay plan for fiscal year 1985, pursuant to 5 U.S.C. 5305(c), and indeed the House Report notes that the Executive Order "was issued pursuant to [inter alia] Pub. L. No. 91-656," which is the Pay Act. See H.R. Rep. 99-142, *supra*, at 141. Congress therefore ratified the pay increase for fiscal year 1985 when it enacted the Supplemental Appropriations Act for that year. More generally, the statements in both the Act itself and the House Report that the funded pay increases were accomplished as "authorized by" and "pursuant to" law, including the Pay Act, are an affirmative congressional recognition of the President's continued use of the alternative pay plan authority.

c. The pattern of congressional action has continued in subsequent years. For example, in Section 15201(a)(1) of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 332, Congress provided that the rates of pay under the General Schedule and other pay systems "shall not be adjusted under section 5305 of [Title 5] during fiscal year 1986." Congress thus froze the then-existing pay rates, which of course had been arrived at over the years by the very alternative pay plans that petitioners challenge in this case (except where Congress enacted a law that overrode the President's alternative plans).

Moreover, in Section 15201(a)(2) of the same Act, Congress specified that "the President shall provide for the adjustment of rates of pay under section 5305 of title 5, United States Code, as appropriate to reduce outlays, relating to pay of officers and employees of the Federal

Government, by at least $746,000,000 in fiscal year 1987 and $1,264,000,000 in fiscal year 1988" (100 Stat. 332). The President obviously was expected to comply with this directive through the alternative pay plan authority, since federal pay continued to lag behind comparability and full comparability adjustments would have required an increase, not a reduction, in outlays. See H.R. Doc. 99-262, 99th Cong., 2d Sess. 1 (1986) (President's alternative pay plan for fiscal 1987). The Senate Report confirms this interpretation, stating that the Act does not mandate a pay raise "but rather retains the current process for determining annual increases through the Pay Comparability Act, *Presidential alternative pay proposals* and subsequent Congressional action." S. Rep. 99-146, 99th Cong., 1st Sess. 432 (1985) (emphasis added).

Finally, in Section 144(a) of the Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, 100 Stat. 3341-3353, Congress enacted a three percent pay increase for federal employees, in lieu of the President's alternative plan of four percent for military personnel and 2% for civilian personnel. H.R. Conf. Rep. 99-1005, 99th Cong., 2d Sess. 785 (1986). This statutorily specified pay adjustment presents yet another insurmountable obstacle to the court-ordered increases for preceding years that petitioners seek, and once again demonstrates that Congress is prepared to enact legislation to supersede an alternative pay plan of the President with which it disagrees.

d. This consistent course of action by Congress and the President, which rests on the assumption that the President's alternative pay plan for a particular fiscal year is valid unless overturned by Congress, demonstrates that petitioners would not be entitled to a retroactive increase in the rates of pay for fiscal years 1980, 1981, 1983 and 1985 even if their argument regarding the severability of the legislative veto provision were correct as an original

matter. There accordingly is no reason for this Court to review the severability ruling by the courts below.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioners' remaining argument (Pet. 10-15)—that the alternative pay plan authority is an unconstitutional delegation of legislative power—is insubstantial and was correctly rejected by the court of appeals in an analysis upon which we largely rely (Pet. App. 21a-23a). That issue does not warrant extensive discussion here, in light of Congress's ratification of the pay adjustments for the four fiscal years at issue.

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